HARVARD

LAW REVIEW.

VOL. XXI. JANUARY, 1908. NO. 3.

CONTEMPT OF COURT, CRIMINAL AND CIVIL.

THE subject of contempt of court, and especially of the punishment for contempt and the process by which punishment is inflicted, has been much discussed of late years. In the course of this discussion it has not always been kept clearly in mind that acts of different kinds have been grouped under this single heading of contempt of court, and as a result much has been urged on each side that might be largely modified by true apprehension of the legal facts. It is proposed in this article to distinguish between different kinds of contempt, and to suggest in connection with each the proper limits of action of the court in punishing.

The word "contempt" is a very old word to cover any act done in violation of a direct order of the king or of any governmental process. From the most ancient times any insult to the king or to his government was punishable as a contempt. Thus, in the time of Edward III persons were punished for contempt for going armed into the king's palace, and for contumaciously disputing the king's title as patron of a priory.[1] In the early years of James I it was held to be a heinous offense against the king to raise a false rumor that he intended to grant toleration to papists.[2] And in the fourth year of his reign two Catholic members of Parliament were attached for contempt to the king in not coming to Parliament at the time the gunpowder treason was intended.[3] These are some early examples of a class of cases, never very numerous, where a direct insult to the king was dealt with as a contempt

[1] Oswald, Contempt, 1, 2.

[2] Cro. Jac. 38, Moore 756.

[3] Lord Sturton's case, Noy 102.

either by indictment or by mere attachment, like the process issued by a court for contempt of itself.

It was not to the king alone that contempt was punishable. One case, at least, is on record where a contempt of the bishop by disturbance in church was punished.[1] Contempt of Parliament, also, was dealt with, and either house of Parliament could commit for contempt of itself.[2] We even have a reference to contempt of the king's officers.[3] But of course the commonest and most important of all contempts in the eye of the law is the contempt of court. Contempt of the court is contempt of the lord of the court. Thus it was contempt of the admiral, and so of his court, to sue for a maritime cause in the king's court either of chancery or of common law,[4] or in the courts of the church [5] or of the city of London.[6] So in a manorial court a contempt is contempt of the lord.[7] In the well-known case of the committal of Prince Henry for contempt by Chief Justice Gascoyn, the learned Chief Justice said, "I keep here the place of the king, your sovereign lord and father, to whom ye owe double obedience."

Any act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases, is a contempt of court entirely similar in kind to the contempt of the king by insults offered to him, or the contempt of Parliament by disturbance made therein. The typical case of this sort is actual disturbance made in the court itself which interferes with the process of litigation. Of such a sort was Judge Terry's contempt in the Hill divorce suit.[8] In that case while the cause was being tried in a circuit court of the United States, the libellant, one Sarah Althea Terry, was guilty of misbehavior in the presence of the court; whereupon the court ordered that she be removed by the marshal. Her husband, an attorney of the court, assaulted and beat the marshal to prevent his carrying out the order of the court. This was done in open court, in the presence of the judges. Such an

---

[1] Carleton *v.* Hutton, Palm. 424.

[2] Murray's Case, 1 Wils. K. B. 299 (1751).

[3] 18 Selden Soc. Pub. (Borough Customs), 107.

[4] 11 Selden Soc. Pub., lxvii, lxviii.

[5] Gorham *v.* Grainger, *ibid.*, lxviii.

[6] Sandiford *v.* Fidele, *ibid.*, lxvii.

[7] "Leaving their business undone, and in great contempt of the lord and of his bailiffs." 2 Selden Soc. Pub., 127.

[8] *Ex parte* Terry, 128 U. S. 289.

act is obviously a contempt which every court has inherent power to punish summarily. A similar contempt was that dealt with in *Ex parte* Wall.[1] In that case the defendant with other persons riotously took from a jail a person accused of crime, during an intermission of the court which was trying him, and hung him from the limb of a tree directly in front of the court-house door, through which the judge passed on his way into court after intermission. This act was not only unlawful; it was a direct insult to the court itself. It was, as the Supreme Court said, perpetrated with audacious effrontery in the virtual presence of the court.

These acts are direct insults to the court itself in its presence. Any act, however, which directly obstructs the course of justice, though done outside the court, is equally a contempt of court. A typical instance of this sort of contempt was the action of the claimant and his friends in the Tichborne case. The Tichborne claimant, having failed in his action to get possession of the Tichborne estates, was indicted for perjury and was about to be tried at the bar of the Queen's Bench. He and his friends made public addresses in various parts of England, stating his side of the case, and denouncing the judges who were about to try the indictment as unfair and prejudiced. Several of the claimant's supporters were committed and fined for contempt of court as a consequence of these proceedings.[2] In the Skipworth case[3] Judge Blackburn thus laid down the rule: "When an action is pending in the court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the courts by the exercise of a summary jurisdiction to deal with and prevent any such matter which should interfere with the due course of justice, and that power has been exercised, I believe, from the earliest times that the law has existed."[4]

A third class of active contempts of court consists in any interference with persons or property which are in the hands of the court. Such, for instance, is interfering with a receiver in the performance of his duty,[5] or marrying a ward of court without

[1] 107 U. S. 265.

[2] Regina *v.* Onslow, L. R. 9 Q. B. 219.

[3] Regina *v.* Skipworth, L. R. 9 Q. B. 230.

[4] Modern instances of this sort where the extent of this power was carefully considered may be found in Rex *v.* Tibbits, [1902] 1 K. B. 77; Globe Newspaper Co. *v.* Com., 188 Mass. 449.

[5] Langford *v.* Langford, 5 L. J. (N. S.) Ch. 60.

license of the court.[1] Such contempts of court as have been described may be briefly summarized as committed by any act which insults the court or directly prevents it from pursuing its will in administering justice.

It has been generally assumed that all contempts of court are of the same sort, and consist in this disrespect to the representative of the king and interference with his action in office; but it is impossible either to understand the law of contempt or to deal satisfactorily with the modern problems that have arisen — in fact, it is impossible for a court to exercise properly the extraordinary power of punishment for contempt — without noticing that contempts of court, so called, are of two kinds, entirely different in origin. The so-called contempt of court which consists in mere disobedience to an order of the court is entirely different, both in its nature and in its origin, from that active contempt, whether in or out of court, which has been considered.

From the earliest times a refusal to obey an order of the king or of his officer, formally and expressly directed to a subject, has been regarded as a contempt. This, doubtless, was deemed a breach of allegiance. "*Contemptus brevium*" was declared by the laws of Henry I[2] to be an offense subjecting a person guilty of it to amercement. In the time of Henry II it was laid down that if a tenant duly summoned in the court was absent, the king or his justices might at their pleasure punish him for his contempt of court.[3] So again, if the demandant in certain cases failed to produce his lord in court, "the body of the demandant himself should be attached on account of his contempt of court, and thus he shall be destrained to appear in court."[4] This was equally true in the inferior courts. Thus it was contempt of the lord of a manorial court for a person owing allegiance to the court to depart from it without answering a complaint.[5] And similarly a burgess was guilty of contempt in failing to appear at the proper time before the borough court.[6] Among the acts of contempt of the Arches court was contempt "*in non parendo mandatis.*"[7] And further,

---

[1] Eyre *v.* Countess of Shaftsbury, 2 P. Wms. 102 (1722).

[2] C. 14.

[3] Glanvill, B. 1, c. xxxiii (1187).

[4] *Ibid.*, B. 2, c. vi.

[5] 2 Selden Soc. Pub., 173 (1296).

[6] 18 Selden Soc. Pub., 188 (Norwich, before 1340).

[7] 16 Selden Soc. Pub., lxxix.

as we have seen, it was contempt of the admiral's court to refuse to sue a maritime cause in that court.[1]

This contempt by mere disobedience was often joined, or was alleged to be joined, with an act of dishonor to the lord. Thus, where the contempt consisted in disobedience to the king's writ, a contemptuous treatment of his seal was usually charged. So, for instance, in a complaint to the chancellor in the time of Henry IV it was recited that a writ of injunction had been granted against suing at common law, "which writ, when a certain messenger delivered it to the said J. H. on behalf of our said Lord the King, . . . he would not open his hands to receive the same, and did no reverence to it, as he ought to every royal mandate; but he threw it under his feet where it lay for some time vilely trampled upon, until others took it up and placed it on the font of the said Church; and of this contempt committed by the said J. H. the said suppliant doth vouch to record J. C. . . . and besides this the said J. H. doth not cease still to sue the said suppliant [notwithstanding] the said royal mandate."[2] But it had very early come to be established that the mere disobedience to a writ under the king's seal was in itself contempt; so in the time of Henry IV it was alleged that a sheriff had been ordered by a writ of injunction to stay execution; nevertheless the said sheriff would not stay the execution, contrary to the tenor of the writ, and in contempt of our lord the king.[3] In one case the chancellor was informed that one Richard Goldsmith received certain writs and letters under the king's privy seal, "in great contempt and despite and would do nothing in compliance therewith."[4] And further, complaints were made to the king's council in Star Chamber for contemptuously disobeying privy seals of the king.[5]

Several instances of contempt of this sort grew out of licenses to English subjects to live abroad. Especially during the stormy times of the Reformation, Protestant or Catholic subjects, as the case might be, secured license to live abroad for a limited time, and there, as it was claimed, confederated with the enemies of the sovereign. In one such case Queen Mary sent over her letter under her privy seal, calling upon one Bartue to return to England; but Bartue's servants intercepted and maltreated the Queen's messenger so that he could not serve the letter. Upon a return to

[1] 6 Selden Soc. Pub., lxviii.
[2] 10 Selden Soc. Pub., 61.
[3] *Ibid.*, 68.
[4] *Ibid.*, 55.
[5] 16 Selden Soc. Pub., 112 (1500); *Ibid.*, 208 (1510).

this effect made in the chancery, Bartue was adjudged in contempt and his lands forfeited; and although when Elizabeth came to the throne his lands were restored, the court was inclined to hold that the punishment for contempt would still remain and must be separately pardoned.[1] A little later Elizabeth sent a similar letter to one of her Catholic subjects living abroad, calling upon him to return forthwith. On this occasion the letter was duly served by the messenger and a return made in chancery, and on the failure of the subject to return, he was adjudged in contempt and his lands sequestered.[2]

Contempt of this last sort — that is, mere disobedience of the king's seal — became of increasing importance from the time the lord chancellor adopted it as the basis of his judicial power. The chancellor had no direct power over property or persons, and no control over any executive officer, sheriff, constable, or bailiff. The decree of his court derived its force from the fact that it was granted by the keeper of the king's seal, and was executed by means of a writ sealed with that seal. The force of this writ did not depend on its being formally served by an officer having power to serve civil process. Any messenger could convey the writ to the person addressed, and a mere knowledge of the king's will by such person compelled him, on his allegiance, to obey without formal service. Disobedience to the order of the court which did not constitute active contempt of court could not be punished, since the order of the court, as such, had no legal force; but disobedience to the king's seal was, as has been seen, a contempt of the king. Thus through the use of the great seal the chancellor got power over defendants in his court.[3]

Langdell describes this process with his usual clearness and accuracy. "The chancellor has never had a seal of his own, and he cannot even compel a witness to appear and testify, except by a writ under the great seal. The chancellor also has to enforce his authority by writ in cases where, upon ordinary principles, a writ is neither necessary nor proper. Thus, all the decisions of the chancellor upon questions brought before him are embodied in orders or decrees, which are formally drawn up in writing, and which, as will be seen presently, always direct the

---

[1] Bartue's Case, Dyer 176 *b*. [2] Knowles *v.* Luce, Moore 109.

[3] "The offense committed is the not paying obedience to the great seal. . . . The mere service of a copy of the decree or order, without such a writ, will not be sufficient." 2 Dan. Ch. Pr., 1 ed., 702.

party against whom they are made to do something. The normal mode of enforcing such orders and decrees would be to serve them upon the parties respectively by whom they were to be performed (generally by showing the original and delivering a copy), and, if they refused obedience, to punish them for contempt of the authority of the court. But in chancery the mode is to issue a writ under the great seal, incorporating in it the tenor of the substance of the order or decree, and commanding the party to perform it; and, if he refuses obedience to the writ, he is guilty of a contempt, not to the chancellor, but to the king."[1]

But as this use of the king's seal became common and process sealed with that seal was issued as of course, disobedience to the seal inevitably and insensibly took on a less serious form. A king's seal which is at the service of a private party in a suit ceases to be a dread symbol of sovereign power and becomes merely part of the machinery of a court administering justice between party and party. So in the centuries between the Tudor and the Hanoverian, the process of contempt for the disobedience of an order in chancery ceased to have any higher significance than that of a step in civil process. While disobedience to process was still punishable as contempt of the king, it was, in fact, a mere method of executing the decree of the court in favor of a successful party to the suit; and it was inevitable that this fact should finally be recognized and given legal effect. The clear and express recognition of it, however, did not come until well on in the nineteenth century. A member of Parliament had been attached for contempt in clandestinely removing a ward of court from the custody of a person to whom she had been committed by the chancellor. He set up his privilege as a member of Parliament, which, it was admitted, was good against a civil process. It was clear that a member of Parliament could not be committed for certain kinds of contempt. Beames, for the defendant, urged that "the court makes no distinction between civil contempts, if I may so express myself, and criminal contempts. The court makes a considerable distinction between what are, in its own language, termed aggravated contempts and those not of an aggravated description." Lord Brougham, however, then Lord Chancellor, drew the distinction between the breach of an order of a personal description and actual interruption of the business of a court. Committal for breach

[1] Langdell, Sum. Eq. Plead., § 38.

of a mere personal order, he said, was in the nature of process to compel performance, and was a civil contempt, to which it was admitted the privilege of Parliament would be a protection.[1] But a commitment for interruption of the court's business, as in the case at bar, was criminal in its nature, and the privilege of Parliament was no answer to it.[2]

This distinction is now well settled in England, where all the resultant differences as to privilege from arrest, the form of appeal, and the pardoning power of the sovereign are maintained between criminal and civil contempts.[3] In this country the distinction has usually been accepted in the same form and with the same results as in the English cases.[4] The Supreme Court of the United States in New Orleans *v.* Steamship Co.[5] held that disobedience to process of equity in a civil suit was contempt of a criminal nature, distinct from the civil suit in the course of which the attachment for contempt was issued; and because the attachment was of a criminal nature it could not be brought up to the Supreme Court on error, but only, as the court intimated, on a certificate of difference of opinion between the judges. If the reason given was necessary to the decision, there is no doubt that this case is an authority which is opposed to the general current of decisions.[6] There is no doubt that an ordinary proceeding for real criminal contempt can be brought up to the Supreme Court in the form of an appeal upon certificate of division by the judges, though the ordinary method to raise in the Supreme Court the question of the legality of the commitment is by a writ of *habeas corpus*.[7] But it would seem in case of commitment for contempt in the course of civil proceedings where no separate process is issued, but the party offending is dealt with

---

[1] Catmur *v.* Knatchbull, 7 T. R. 448 (1797).

[2] Wellesley's Case, 2 Russ. & M. 639 (1831).

[3] *In re* Freston, 11 Q. B. D. 545; Harvey *v.* Harvey, 26 Ch. D. 644; Regina *v.* Barnardo, 23 Q. B. D. 305; O'Shea *v.* O'Shea, 15 P. D. 59; *In re* Special Reference, [1893] A. C. 138.

[4] Naturita C. R. Co. *v.* People, 30 Colo. 407; Leopold *v.* People, 140 Ill. 552; Swedish Am. Tel. Co. *v.* Casualty Co., 208 Ill. 562; Beck *v.* State, 72 Ind. 250; Arnold *v.* Com., 80 Ky. 300; State *v.* Becht, 23 Minn. 411; Thompson *v.* R. R., 48 N. J. Eq. 105; People *v.* Court of Oyer & Terminer, 101 N. Y. 245; State *v.* Knight, 3 S. D. 509.

[5] 20 Wall. (U. S.) 387.

[6] The same view is held in a few states. *Ex parte* Gould, 99 Cal. 355; Haight *v.* Lucia, 36 Wis. 360.

[7] *Ex parte* Terry, 128 U. S. 289.

upon motion for a mere breach of an order of the court pending the progress of the suit, that the question cannot be taken directly up to the higher court, either by appeal or by writ of error. In such a case, if there is no ground for *habeas corpus*, the determination of the question of contempt by the higher court must await the final disposition of the principal suit. For that reason it would seem that the decision of the Supreme Court in the New Orleans case can be supported without deciding the question of whether the contempt was criminal or civil. There is no doubt that the decision was followed on the exact ground that the proceeding was a criminal one in several of the federal courts,[1] but the Supreme Court recognized the established distinction later in the Debs case,[2] where Mr. Justice Brewer said: "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing the suitors the rights which it had adjudged them entitled to." The federal courts now appear firmly to hold the doctrine of the English cases,[3] which may now safely be asserted as the recognized doctrine both in England and in this country.

This difference in nature between the contempt of the king's seal on a writ and active contempt of the court appears also in the method by which the court deals with the contempt. Active contempt of the court, like similar contempt of the king, is a crime, and indeed may be indicted and punished as a misdemeanor. It is usually dealt with summarily by the court, which causes the immediate arrest of the offender and sentences him to a fine or imprisonment as a punishment for his wrongdoing. Quite otherwise is the action of the court where its injunction or other order or decree is violated by the person to whom it is addressed. In such case the violation is called to the attention of the court by the injured party, and if the violation is proved the wrongdoer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong. As early as the time of Richard III it was said that the chancellor of England compels a party against whom an order is issued by imprisonment;[4] and a little later it was said in the chancery that "a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him

[1] Fischer *v.* Hayes, 6 Fed. 63; *In re* Mullen, 7 Blatchf. (U. S.) 23.
[2] *In re* Debs, 158 U. S. 564.
[3] *In re* Nevitt, 117 Fed. 448.
[4] 2 R. III, 9, pl. 22.

to prison till he obey, and that is all the chancellor can do."[1] This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king. Down to within a century it was very doubtful if the chancellor could under any circumstances inflict punishment for disobedience of a decree. If the decree commanded the defendant to transfer property, the chancellor acquired power as early as the sixteenth century to sequester the property as security for performance; but if the decree were for the doing of any other act, or were a decree for an injunction, the chancellor was helpless if he could not compel obedience by imprisonment. There were, to be sure, one or two instances where an impetuous chancellor appears to have used stronger methods of persuasion than were properly within his right. Thus Daniell, following earlier writers, mentions with bated breath an occasion where a contumacious defendant was loaded with chains, another where his wife and children were refused permission to see him, and even a third where the chancellor imposed a fine.[2] But it is obvious that even so late as 1830 this was regarded as an improper method of enforcing obedience. In any case the contempt of a defendant who had violated a decree in chancery could be purged by doing the act commanded and paying costs; or, if his disobedience had been the violation of a negative injunction, he could purge himself of contempt by undoing what he had done and paying costs. In any case a waiver of the terms of the decree by the other party to the suit put an end to the imprisonment for contempt.[3]

It thus appears that imprisonment for contempt of the chancellor's decree, or rather for contempt of the king's writ issued in execution of such decree, was not punitive but coercive; and that anything in the nature of a sentence to a definite punishment, like a fine or an imprisonment for a term, was entirely foreign to the process. It sometimes happened, however, that a person violated a decree in such a way that it was impossible for him to restore the *status quo ante*. In such a case if the other party to the suit were obdurate he might remain in prison during the rest of his life, through his inability to purge himself of his contempt. This was obviously a hardship and an injustice, and a limited term of imprisonment came to be looked upon as a requirement of humanity. It was probably for this reason that in

[1] 27 H. VIII, 15.
[2] 2 Dan., Ch. Pr., 1 ed., 721.
[3] 1 *ibid.*, 660, 663; 2 *ibid.*, 726.

recent times a sort of punishment by limited term of imprisonment or even by fine, payable to the injured party, has been substituted for the old coercive imprisonment in case of civil contempt.

It should be noticed, in passing, that an act which is a violation of an injunction may at the same time possess all the features of an active contempt of court. In a case, for instance, like that of Debs,[1] where the defendant, in violation of an injunction against stopping mail-trains, collected a great assembly of men and riotously interfered with the running of the trains, the act, it would seem, was not merely a violation of the injunction, but was an active contempt of the court which issued it and of the sovereign whose mails were thus obstructed. In such a case the requirements of the private suit would be met by simple restraint of the person until the danger of violation of the injunction had passed, or until security was given that the injunction would not be violated; but in addition a punitive sentence is called for on account of the contemptuous nature of the act of violation.

This discussion of the nature of contempts and of the proper punishment for them throws light on one of the most vexed questions of procedure that have lately been agitated. It has been urged with great earnestness and force that no one should be punished for a contempt of court except after a trial by jury and a verdict of guilty. It is urged that the whole genius of our law requires a verdict of a jury before punishment for a crime, and that it is contrary to all our charters of liberty, from Magna Carta to the Constitution of the United States, to permit a man to be charged with crime, convicted of it, and punished for it by the mere will of a judge who fancies himself offended. It is especially urged in the case of labor troubles that it is an enormous and dangerous power to put in the hands of an equity judge. When a single judge sitting without a jury can issue an injunction against a strike, can pass upon a charge that the injunction has been violated, and can imprison at his own will the person found guilty of it without any opportunity for pardon by the executive (since the proceeding is one for civil contempt), too much power, it is contended, over the lives and liberties of freemen is placed in the hands of a single irresponsible magistrate.

With reference to the question of what is the proper process in punishments for contempt, it will be seen that there is a sharp dif-

[1] *In re* Debs, *supra*.

ference between acts done in the face of the court itself and acts done outside court which will, nevertheless, interfere with the course of justice. The necessity for a summary and exemplary punishment is far greater in the case of a direct contempt in face of the court than in the case of a contempt outside court. A danger always exists in the punishment of any contempt by summary process by the judge who has suffered from the contempt; he is made both judge and jury in his own case, he passes on the facts and on the law, and determines the punishment. Such a power in the hands of an angry man is, of course, subject to abuse; and judges, being human, are subject to anger like other men. But if contempt is to be punished *instanter*, it must be done in most cases by the judge himself who is the subject of the contempt, and he must act in many cases under the influence of a strong feeling of insult. In the case of contempt offered directly in the face of the court there seems to be no other course to adopt than the immediate punishment of the offender. The danger of harshness on the part of the judge is a less evil than the danger of a complete suppression of the functions of justice by permitting an uproar to continue unchecked. The least thing that can be done is to imprison the offender as a preventive measure. There is no doubt that the judge has power to act immediately, without attachment or other process, upon his own knowledge, and to condemn and punish without receiving further evidence than that of his own senses. In the ordinary case there is equally no doubt that the better course is to order the offender imprisoned instantly, but to permit him later to purge himself of the contempt.

When the act of contempt does not occur in the face of the court but by some act done out of court and interfering with the course of justice, a more regular procedure is required. An attachment issues on affidavits, the offender is brought before the court and has an opportunity to disprove the facts charged against him. This very circumstance, that the forms of contentious procedure are complied with, prevents the infliction and punishment in such a summary form as that employed for a direct contempt in the face of the court. Summary punishment is less necessary in such cases. A delay of a day or two, especially after service of the attachment, will not necessarily prejudice the court. Under these circumstances it will ordinarily be possible, except in the case of a court where there is only a single judge, to secure a trial before some other judge than the one directly attacked or the one especially

interested in the trial. So in the Tichborne case[1] the chief justice, who was an especial object of attack by the claimant's friends, did not sit in the proceedings for contempt, and the opinion was delivered by Mr. Justice Blackburn, who, it was known, was not to sit at the trial. But the fact that a short delay is possible gives an opportunity in such proceedings to summon a jury and have the question of fact passed upon by it. Many states by statute now require this form of process, and there can be no reasonable objection to it. The argument often offered in favor of such a course, to be sure, is not sound; namely, that otherwise the person attached would be convicted of a crime without a trial by jury. The process is, it is true, in the large sense, a criminal one; but the attachment for contempt is, nevertheless, not a proceeding against a man for a technical crime. The person attached and punished for contempt may independently and thereafter be indicted and punished for the crime he has committed. And yet, though technically there is no constitutional objection to the trial of such a contempt without a jury, and indeed it does not differ in kind from the contempt committed in face of the court where a jury trial is out of the question, the same general considerations of justice which lead to a jury trial upon a charge of crime also lead to the conclusion that a jury trial in such a case, where it is practicable, is required.

In the case of contempt in violating an order or decree of a court of equity, we have an entirely different problem. So far as the ancient process has not been modified by modern innovations, we have seen that it was purely coercive, not punitive. Where this is still the case, it seems clear that a trial by jury is not required by the general principles of the law or by general considerations of justice; nor, as a matter of fact, would it be generally practicable. If the court limits itself to its proper action in such cases, namely, process of imprisonment merely to prevent the violation of the decree, and if the imprisonment is to cease as soon as the danger of disobedience has ceased, the jury, which is thought necessary to pass upon the desert of a defendant to suffer punishment, is not required. Nor is there any reason why the judge who is dealing with the subject-matter of the suit should not also deal with this process for enforcing obedience to his decree. No question of passion or prejudice is involved; but, on the other hand, a

[1] *Supra.*

knowledge of the issues of the case is essential to a proper dealing with the problem. This knowledge is already in the possession of the judge who is trying the principal case. So far, therefore, as popular clamor demands a trial by jury in such a case, it seems to go beyond the requirements of justice; and the statutes which commit the trial of questions of fact in such process to a jury are not likely permanently to prove satisfactory. This statement, however, is to be limited to cases of merely preventive imprisonment. Where the court inflicts a definite term of imprisonment by way of punishment for the violation of its orders, the case does not differ, it would seem, from the case of criminal contempt out of court, and regular process and trial by jury should be required.

Joseph H. Beale, Jr.